

FCC MAIL SECTION

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-148

In the Matter of

Amendment of Section 73.202(b), RM-8022
Table of Allotments,
FM Broadcast Stations.
(Ludlow, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 4, 1995; Released: January 12, 1995

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 7 FCC Rcd 4460 (1992), issued in response to a petition filed on behalf of Miracle Broadcasting ("petitioner") proposing the allotment of Channel 261B1 to Ludlow, California, as that community's second local FM service. Petitioner filed supporting comments in response to the *Notice*. Opposing comments were filed by KHWY, Inc. ("KHWY"), licensee of Station KHYZ(FM), Channel 258B, Mountain Pass, California,¹ to which petitioner responded. Reply comments were also filed individually by Kenneth B. Orchard ("Orchard"), KOLA, Inc. ("KOLA"), licensee of Station KOLA(FM), San Bernardino, California, and American Radio Brokers, Inc. ("ARBI").²

2. In response to the *Notice*, KHWY poses two objections to the proposed allotment of Channel 261B1 to Ludlow. First, KHWY claims that no technically feasible site is available at the restricted site or surrounding area to accommodate proposed Channel 261B1 at Ludlow and therefore, the allotment proposal should be denied. Specifically, KHWY asserts that the reference site for Channel 261B1 is located in a wilderness study area which is under the auspices of the Bureau of Land Management ("BLM") of the Department of the Interior. Accordingly, KHWY contends that construction of any kind in that area is prohib-

ited.³ Furthermore, KHWY asserts that once a substantial question has been raised concerning the availability of a technically feasible site that complies with the Commission's rules, in accordance with established precedence the proposal must be rejected, citing *Creswell, Oregon*, 3 FCC Rcd 4608 (1988) and *Pinckneyville, Illinois*, 41 RR 2d 69, 71 (1977). KHWY comments that as the restricted site is located on land under the jurisdiction of another federal agency, the Commission must confer with that agency prior to allocation to determine whether a given area is available, citing *Bay Shore, New York*, 25 FCC 2d 877, 881-82 (1970), and *San Clemente, California*, 50 FR 8326 (published March 1, 1985).

3. Secondly, KHWY claims that proposed Channel 261B1 would be subject to interference caused and received from grandfathered Station KOLA(FM), Channel 260B, San Bernardino, California.⁴ KHWY claims that although proposed Channel 261B1 at Ludlow complies with Section 73.207(b) of the Commission's Rules, the Commission has declined to make allotments that would create interference due to the presence of a grandfathered station, citing *Vallejo, California*, 40 RR 2d 648, 651-52 (1977), *affirmed* 44 RR 2d 375 (1978); *Muncie, Indiana*, 32 FCC 2d 839, 842-44 (1972), *reconsideration denied*, 38 FCC 2d 324 (1972). Consequently, KHWY urges that the proposed allotment of Channel 261B1 to Ludlow is defective and should be rejected. However, as a means of providing an additional FM outlet to Ludlow, KHWY suggests that Channel 243B1, or a Class A channel, could be allotted to Ludlow, and stated its intention to apply for such channel, if allotted.

4. In response to KHWY's claim of an unavailable site to accommodate the proposed allotment of Channel 261B1 to Ludlow, petitioner provided a letter from the Area Manager of the Needles, California, field office of the Bureau of Land Management stating that the BLM also administers public lands within the petitioner's area of interest that are not within the protected boundaries of the wilderness study area. Petitioner also provided a map to depict an area in which to locate Channel 261B1 at Ludlow. Petitioner comments that the Commission assumes the availability of sites on BLM land that are not subject to special protection, citing *Los Alamos, New Mexico*, 7 FCC Rcd 3249 (1992).

5. As to the alleged predicted interference that the proposed allotment of Channel 261B1 at Ludlow would cause to grandfathered Station KOLA(FM), Channel 260B, San Bernardino, California, and the potential predicted interference to KHYZ(FM), Channel 258B, Mountain Pass, California, petitioner comments that pursuant to Section 73.209(b) of the Commission's Rules, the degree of inter-

¹ Commission records indicate that KRXX, Inc., rather than KHWY, Inc., is the licensee of Station KHYZ(FM), Channel 258B, Mountain Pass, California.

² The reply comments of Orchard, KOLA and ARBI were not served on the petitioner in violation of Section 1.420(c) of the Commission's Rules, and therefore they have not been accepted for consideration.

³ KHWY provided a letter statement from the Acting Area Manager of the Needles, California, field office of the Bureau of Land Management, which indicates that as the site identified in the *Notice*, as well as the site specified by the petitioner in its proposal to accommodate the Ludlow proposal, are in a wilderness study area, the construction of radio facilities therein would be prohibited.

⁴ Station KOLA(FM), operates with an effective radiated power

(ERP) of 29.5 kilowatts at an antenna height of 507 meters. According to KHWY's engineering statement, based upon the use of maximum facilities for proposed Channel 261B1 at Ludlow (25 kW 100 meters) the interfering contour (51 dBu) from Station KOLA will overlap the protected contour (57 dBu) of proposed Channel 261B1 at Ludlow. And, the predicted interfering contour (48 dBu) of proposed Channel 261B1 at Ludlow would overlap the protected contour (54 dBu) of Station KOLA.

⁵ KHWY also alleges that the proposed allotment of Channel 261B1 at Ludlow has a potential to cause interference to grandfathered Station KHYZ, Channel 258B, Mountain Pass, California, operating with an effective radiated power of 10.0 kilowatts at an antenna height of 521 meters.

ference protection afforded to permittees and licensees of FM broadcast stations is limited solely to the extent specified by the minimum distance separation requirements using maximum parameters for its class. Therefore, petitioner remarks that its proposal is consistent with current Commission procedures which allots fully-spaced channels notwithstanding potential interference to grandfathered stations.

6. As to KHWY's suggested allotment of Channel 243B1 to Ludlow as an alternative to Channel 261B1 at that community, petitioner's engineering statement notes that the closest reference site to accommodate Channel 243B1 is approximately 17 kilometers from the community, whereas Channel 261B1 can be allotted at a less restrictive site. Therefore, petitioner remarks that KHWY's alternate proposal is inferior and urges its rejection. In conclusion, petitioner requests that since its proposal meets the Commission's technical requirements, and KHWY has failed to rebut the presumption of available sites to accommodate its proposal, that Channel 261B1 be allotted to Ludlow as set forth in the *Notice*.

7. Initially, we address KHWY's assertion regarding the lack of a suitable transmitter site to accommodate the petitioner's proposal. Although KHWY presented a document from the BLM indicating that the reference site for proposed Channel 261B1 at Ludlow is in a wilderness study area, and therefore unavailable for the construction of radio facilities, the petitioner also produced a document from a BLM official stating that the agency also manages public land use areas in the petitioner's area of interest, that are not subject to any restrictions. Pursuant to our own independent inquiry, the staff has been informally advised by the BLM that there are indeed public land areas within those administered by it that are not within protected areas. Therefore, consistent with Commission precedent, the willingness of the BLM to entertain petitioner's request for use of the land under its jurisdiction is adequate to provide a reasonable assurance that a site meeting the Commission's technical requirements is available. See *Los Alamos, New Mexico, supra*; see also, *Nyssa, Oregon*, 5 FCC Rcd 7404 (1990).

8. With regard to KHWY's claim of interference that proposed Channel 261B1 would cause to Station KOLA(FM), San Bernardino, and the potential interference to Station KHYZ, Channel 258B, Mountain Pass, California, each of those facilities operate in accordance with Section 73.211 of the Commission's Rules. As early as 1962, the Commission addressed the extent of protection to be afforded to stations previously authorized to operate with maximum facilities exceeding those for their class.⁶ It was determined that the only protection to which super powered stations would be entitled vis-a-vis new allotments is that provided by the minimum distance separation requirements as determined by the maximum power and antenna height parameters for its class. See Section 73.209 of the Commission's Rules. In formulating its protection standards, the Commission recognized that while such methodology could result in some derogation of existing service in some instances if new allotments were made at

or near the minimum spacings, any resulting loss in service to an existing grandfathered station would be more than offset by the gain in over-all FM service resulting from that to be provided by the new allotment. Further, the Commission stated it did not believe the public interest would be served by perpetuating the advantage enjoyed by super-maximum stations, if it meant a restriction on the provision of new facilities. Therefore, KHWY's argument in this regard is without merit.⁷

9. Next, we turn to KHWY's suggested allotment of Channel 243B1 or a Class A channel to Ludlow as an alternative to Channel 261B1, either of which it states an intention to apply. In the interest of providing effective and efficient management of the frequency spectrum, and as a means of providing the public with the widest coverage area broadcast facility possible, the Commission will allot the highest class channel requested to a community that meets the technical provisions of our rules. Therefore, as it has been demonstrated that a Class B1 channel is available to Ludlow, we will not consider a Class A allotment.

10. As to KHWY alternate proposal to allot Channel 243B1 to Ludlow, it would require a site restriction 18.3 kilometers (11.4 miles) west of the community, whereas Channel 261B1 would be less restrictive. In determining compliance with Section 73.207(b) of the Commission's Rules, if a new proposed allotment requires a site restriction, the Commission will endeavor to impose that which is the least restrictive theoretical site from the intended city of license. See *Vacaville, California*, 4 FCC Rcd 8315 (1989), *recon. denied*, 6 FCC Rcd 143 (1991). Additionally, a staff engineering analysis indicates that due to a terrain obstruction, operation from the site required for Channel 243B1 would present a line-of-sight service problem to the community of Ludlow, in contravention of Section 73.315 of the Commission's Rules.

11. In view of the above, we believe the public interest would be served by allotting Channel 261B1 to Ludlow, California, since it could provide a second local FM service to that community.

Technical Statement

12. Channel 261B1 can be allotted to Ludlow consistent with the minimum distance separation requirements of Section 73.207(b)(1) and (3) of the Commission's Rules provided the transmitter is located at least 11.9 kilometers (7.3 miles) northeast⁸ of the community

13. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective February 27, 1995, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Ludlow, California	261B1, 289A

⁶ See, *First Report and Order*, Docket No. 14185, 40 FCC 662 (1962).

⁷ KHWY reliance on *Vallejo, California* and *Muncie, Indiana, supra*, is inapposite as each proceeding concerned interference that a new allotment would create indirectly (based on multiple

channel substitutions elsewhere to accommodate the allotment), to an existing station within its protected service contour from a grandfathered station.

⁸ Coordinates used for Channel 261B1 are 34-47-31 and 116-03-56.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. The window period for filing applications for Channel 261B1 at Ludlow, California, will open on **February 27, 1995**, and close on **March 30, 1995**.

16. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process for Channel 261B1 at Ludlow, California, should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

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